STATE OF MICHIGAN

COURT OF APPEALS

AMIR AL-JANABI and MAHA HINOW,

Plaintiffs-Appellants/Cross-Appellees,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
July 26, 2007

No. 268978
Wayne Circuit Court
LC No. 03-339521-NF

Before: Fitzgerald, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

In this action under the no-fault law, plaintiffs appeal as of right a judgment of no cause of action entered after a jury determined that plaintiffs did not sustain bodily injury as a result of a September 22, 2002, automobile accident. Defendant State Farm Mutual Insurance Company, plaintiffs' automobile insurer, cross-appeals the order denying its request for sanctions under MCL 500.3148(2). We affirm.

This cause of action arises from a claim for personal injury protection benefits arising from a September 22, 2002, automobile accident. Plaintiffs, who are residents of Indiana, came to Michigan the afternoon of September 21 to purchase groceries and meat and intended to stay with a family member, Amir Abdul. At 9:00 p.m. that evening, plaintiffs went to K-Mart to purchase a camera. While on the way home, plaintiffs' vehicle was rear-ended while waiting at a stoplight. Dearborn Heights police officer Shaun Pawlus responded to the scene at 12:50 a.m. He did not observe any obvious signs of injury, but plaintiffs complained of pain. Plaintiffs were transported to Sinai-Grace Hospital, where both plaintiffs presented subjective complaints of neck and back pain. Both plaintiffs were released without any objective findings of injury and told to follow up with their family physician as needed.

On September 24, 2002, plaintiffs consulted a doctor, Dr. Elmenini. Dr. Elmenini diagnosed Hinow with soft tissue injuries. Dr. Elmenini diagnosed Al-Janabi with back and lumbar radiculopathy (pinched nerve) at L4-L5 of the lumbar spine. Dr. Elmenini prescribed ibuprofen and physical therapy. Dr. Elmenini related Al-Janabi's problems to the September 22, 2002, car accident based on Al-Janabi's history. Dr. Elmenini conceded that relating an injury to a specific event required an accurate history. He indicated that Al-Janabi never informed him

that he had been in an automobile accident in 1998, never indicated that he had been previously diagnosed with lumbar radiculopathy and that an MRI showed spinal stenosis at L4-L5 with impingement, and never informed him that he received physical therapy in 1998 as a result of the accident.

Medical records revealed that plaintiff treated at the same physical therapy clinic, Rehab Max, in 1998, as he did in 2002. Defendant introduced evidence revealing that Al-Janabi received the same treatment in both 1998 and 2002 for the same problems. In his discovery deposition and in his interrogatory answers, Al-Janabi denied that he treated at Rehab Max in 1998. At trial, however, Al-Janabi admitted that he attended Rehab Max in both 1998 and 2002.

During the period of time that plaintiffs allegedly received treatment at Rehab Max, the clinic was under surveillance for reasons unrelated to plaintiffs' claims. After reviewing the surveillance tapes from the last week of November 2002 and the first week of December 2002 and realizing that the dates of the surveillance were dates for which defendant received bills for services at Rehab Max, defendant's claim representative, Linnea Murray, interviewed plaintiffs at their home. Plaintiffs indicated that they regularly attended appointments at Rehab Max on Mondays, Wednesday, and Fridays, and that they never missed an appointment. During an examination under oath in February 2003, plaintiffs testified that they attended appointments on Mondays, Wednesdays, and Fridays, and that they never missed an appointment between November 2002 through February 2003. At trial, however, both plaintiffs testified that they would sometimes "skip a day" but would "make it up."

After reviewing the surveillance tapes, plaintiffs' testimony during the examination under oath, and the bills submitted by Rehab Max, Murray determined that plaintiffs never passed through the door of Rehab Max on the dates for which defendant received bills for treatment. In April 2003, Murray went to plaintiffs' home and informed them that defendant possessed surveillance tapes revealing that plaintiffs had not attended appointments that they claimed to have attended and that their benefits were being suspended. In a certified letter dated August 14, 2003, defendant informed plaintiffs' counsel in relevant part:

> Our investigation of the incident of September 22, 2002, has led us to the conclusion that your client, Amir Al Janabi, has made false statements with the intent to conceal or misrepresent material fact in connection with the submission of his claim.
>
> This is consistent with the following policy provision:
>
> **Conditions – Section 7. Concealment or Fraud**.
>
> There is no coverage under this policy if you or any other person insured under this policy has made false statements with the intent to conceal or misrepresent any material fact or circumstance in connection with any claim under this policy.

A jury determined that neither plaintiff sustained an accidental bodily injury and therefore the jury did not reach the questions of whether plaintiffs incurred allowable expenses, whether plaintiffs suffered a work loss, whether plaintiffs reasonably incurred replacement services, and whether plaintiffs defrauded defendant.

I

Plaintiffs first argue that the trial court erred by denying their motion for a new trial. The denial of a motion for new trial is reviewed for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). Plaintiffs assert that they are entitled to a new trial on several grounds.

Plaintiffs first claim that they were denied a fair trial by the misconduct of defense counsel. They suggest that defense counsel purposely inflamed and prejudiced the jury by questioning Murray with regard to whether the accident was "staged."

After plaintiffs' counsel suggested to the jury that defendant was unfair to plaintiffs because of their race, defense counsel questioned Murray with regard to the reason plaintiffs' claim was referred to her in the special investigative unit. Murray explained that the claim was referred to the unit because the accident had indicators developed by the National Insurance Crime Bureau that were indicative of a staged accident. These factors included the fact that the two vehicles involved in the accident were from out of state, both had a significant total loss history, and the accident occurred late at night without witnesses. Murray admitted, however, that an investigation did not conclusively determine whether the accident was staged. Murray's investigation of the claim was relevant and admissible, and plaintiffs have failed to establish that the line of questioning denied them a fair trial.

B

Plaintiffs also argue that they were denied a fair trial when the trial court allowed the late endorsement of Murray and DiBardino, who was hired to perform the surveillance on Rehab Max, to testify at trial with regard to the surveillance tapes. They claim surprise as the justification for their argument.

Trial courts should not be reluctant to allow an unlisted witness to testify where justice so requires. *Pastrick v General Telephone Co*, 162 Mich App 243, 245; 412 NW2d 279 (1987). There is no list of conditions that must be met before the late endorsement is proper. *Id.* A trial court should set appropriate conditions to prevent prejudice and to enable the opposing party to meet the testimony of the new witness. *Id.* at 246. "[J]ustice is best served where an unlisted witness can be permitted to testify while the interests of the opposing party are adequately protected" because doing so affords the jury "a fuller development of the facts surrounding the case." *Id.* at 246.

The record reveals that plaintiffs were aware of the existence of the surveillance tapes and were advised that the surveillance tapes revealed that plaintiffs did not visit the clinic on the dates for which defendant was receiving bills for services allegedly provided by Rehab Max. There is no evidence in the record that plaintiffs ever sought discovery of the tapes or requested a copy of the tapes. Under these circumstances, plaintiffs were not unfairly surprised by the late endorsement of the witnesses and their testimony regarding the surveillance tapes.

C

Plaintiffs argue that they were denied a fair trial by the introduction of evidence regarding Al-Janabi's 1998 car accident because the evidence was irrelevant and prejudicial. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence is admissible and irrelevant evidence is not. MRE 402. Key issues at trial were whether the accident caused plaintiffs' alleged injuries and the extent of those injuries. The fact that Al-Janabi had a similar accident four years earlier in which he suffered the same injuries to the same parts of his body was relevant under MRE 401. The existence of Al-Janabi's prior automobile accident tended to make his assertion that his injuries were caused by this accident, rather than the prior accident, less probable. Further, Al-Janabi failed to inform his treating physician of the prior accident, injuries, and treatment. His failure to provide an accurate medical history was relevant to his credibility as well as the foundation for the opinion of his treating physicians. Accordingly, the evidence of plaintiff's prior accident was relevant to a contested issue.

D

Plaintiffs maintain that defense counsel solicited irrelevant testimony from Murray that the other vehicle involved in the accident had been involved in "suspicious claims." Plaintiffs did not object to the testimony on the ground of relevancy; thus, this assertion is not properly preserved for appeal[1] and we decline to address it. See *Higgins Lake Property Owners Ass'n v Gerrish Twp*, 255 Mich App. 83, 117, 662 NW2d 387 (2003) (issues first raised on appeal need not be addressed by the appellate court).[2]

E

Plaintiffs contend that defendant improperly elicited hearsay testimony from Murray that "Rehab Max had other suspicious claims" with defendant. The testimony was elicited to explain the basis for defendant's surveillance and investigation of Rehab Max and the testimony was based on Murray's personal knowledge. Nonetheless, the trial court sustained plaintiffs' objection to the testimony and ordered the jury to disregard it. Plaintiffs have demonstrated no prejudice as a result of the trial court's ruling.

F

Plaintiffs argue that defendant's claim representative, Brian Austin, was not qualified as an expert and offered improper expert testimony "that the accident was suspicious because the

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[1] It is well established that an objection based on one ground is insufficient to preserve for appellate review an argument based on a different ground. *Kubisz v Cadillac Gage, Inc*, 236 Mich App 629, 637; 601 NW2d 160 (1999).

[2] Nonetheless, the evidence was offered for the limited purpose of establishing why plaintiffs' claim was referred to the special investigation unit.

cars did not line up properly." Plaintiffs do not provide a citation to the record where the improper testimony alleged occurred, and a review of the transcript does not reveal any such testimony.[3] Thus, plaintiffs' argument is misplaced.

G

Plaintiffs assert that Murray's testimony regarding plaintiffs' statements was hearsay because the statements were made through an interpreter. Plaintiffs have failed to provide legal authority for their argument. Nonetheless, although an interpreter acted as the go-between for Murray and plaintiffs, Murray was the person to whom plaintiffs directed their statements, while the interpreter was the "language conduit" or agent of Murray and, therefore, did not add a layer of hearsay. Plaintiffs' statements qualified as a party admission pursuant to MRE 801(d)(2).

Plaintiffs further assert that defense counsel elicited medication opinion and testimony from Murray "knowing that she does not have any medical expertise." The allegedly improper testimony to which plaintiffs refer involved Murray's testimony that defendant's investigation revealed that plaintiffs did not attend the medical appointments for which reimbursement was being sought and that defendant did not obtain an independent medical examination of the plaintiffs. Contrary to plaintiffs' suggestion, Murray's testimony did not involve a medical opinion but, rather, whether plaintiffs actually received the treatment at issue. Plaintiffs' argument is without merit.

H

Plaintiffs contend that the surveillance videotapes were improperly admitted because a foundation was not laid for admission of the tapes and the tapes were untrustworthy. DiBardino testified that his initial assignment called for three clinics to be placed under surveillance, two on Fort Street and one on Oakman Street. The two tapes DiBardino brought with him to trial were the tapes of Rehab Max located at 5141 Oakman Street. The tapes introduced at trial demonstrate that, when the door to the clinic is open, the address 5141 Oakman is displayed. DiBardino specifically testified that no tapes of other clinics were put into evidence. A foundation for admission of the videotapes was properly established. Plaintiffs assert that the tapes were untrustworthy because DiBardino testified that the videotapes were taken on January 6, 2006, a date not relevant to this litigation. In support of this argument, plaintiffs quote from the trial transcript. However, the quotation provided by plaintiffs is incomplete, and fails to reveal that subsequent questioning of DiBardino and a bench conference revealed that the tapes were actually copied on that date. And, although plaintiffs assert that Murray testified that the surveillance was conducted on Oakland Street, the word "Oakland" is clearly a typo in the transcript as Murray later testified that the address of the clinic was 5141 Oakman. The trial court did not abuse its discretion by admitting the videotapes into evidence.

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[3] An accident reconstruction report was introduced without objection and indicates that the vehicles did not line up properly, but neither the report nor the contents of the report were ever specifically mentioned by either of defendant's representatives.

II

Next, plaintiffs argue that the trial court erred by denying plaintiffs' motion for directed verdict with regard to defendant's affirmative defense of fraud. This Court reviews de novo a trial court's decision to deny a motion for a directed verdict thereby allowing an issue to be submitted to the jury. *Zantel Marketing Agency v Whitesell Corp,* 265 Mich App 559, 568; 696 NW2d 735 (2005).

The jury was presented with a jury verdict form that included one special question, question number 3, which asked if plaintiffs submitted a fraudulent claim. However, the jury did not get to the fraud question because it answered "no" to question number 1 asking if plaintiffs sustained an accidental bodily injury. Consequently, the jury did not consider the fraud defense. Thus, the issues of whether the trial court erred in denying plaintiffs' motion for directed verdict on the fraud defense or whether the claim was sufficiently pled are moot.

III

Plaintiffs also argue that the trial court erred by denying plaintiffs' motion for judgment notwithstanding the verdict. This Court reviews a decision on a motion for judgment notwithstanding the verdict de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan,* 469 Mich 124, 131; 666 NW2d 186 (2003). In considering such a motion, the evidence is viewed in the light most favorable to the non-moving party. *Sniecinski, supra.* A motion for a new trial on the grounds that the verdict was against the great weight of the evidence is reviewed for an abuse of discretion, and substantial deference is given to the trial court's ruling that the verdict was not against the great weight of the evidence. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). "This Court and the trial court should not substitute their judgment for that of the jury unless the record reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.*

Plaintiffs had the burden of proving that they were injured and that their injuries arose out of the accident. Plaintiffs argue that the verdict was against the great weight of the evidence because the jury found that plaintiffs did not suffer any injuries from the accident. Plaintiffs specifically assert that the medical evidence clearly showed that they suffered injury in the accident. With regard to Al-Janabi, the evidence showed that he was involved in a 1998 automobile accident after which he complained of back and neck injuries. Al-Janabi did not disclose the 1998 accident to his treating physicians. Dr. Elmenini, the sole medical witness to testify on behalf of Al-Janabi, testified that Al-Janabi never told him that he suffered a previous back injury. He also testified that an accurate medical history is essential to rendering an accurate medical opinion. Although Al-Janabi's treating neurosurgeon, Dr. Diaz, who did not testify at trial, diagnosed plaintiff with a herniated disc, Dr. Diaz noted in his report that Al-Janabi did not have any prior injuries. The history form presented to Dr. Diaz indicated that he had not been involved in any previous accidents and that he had not suffered any previous injuries to his back or neck.

Al-Janabi was transported to the emergency room following the alleged accident. At trial, he insisted that he was unconscious for five minutes after the accident. But the EMS and emergency room records demonstrate that Al-Janabi was conscious. The emergency room record notes that Al-Janabi's physical examination was normal. The record does not diagnose

any type of injury, but rather notes Al-Janabi's subjective complaints. The only objective test presented at trial that showed any signs of injury was an MRI of the lumbar spine that noted findings at L4-L5. The 1998 report of Al-Janabi's physician also demonstrated findings at L4-L5 and the same complaints of injury. A review of the evidence, where Al-Janabi did not present an accurate medical history to his treating physicians and where there were not any new objective findings of injury after the 1998 accident, reveals that the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. The jury could have found that plaintiffs suffered no injury from the accident, or that any of plaintiffs' medical limitations were related to the previous accident and were completely unrelated to the accident.

With regard to Hinow, plaintiffs presented evidence of her subjective complaints. Plaintiffs offered no evidence of objective injuries suffered by Hinow. Indeed, all of the objective tests performed on Hinow were negative. The evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.

IV

On cross-appeal, defendant argues that the trial court erred by denying defendant's request for sanctions under MCL 500.3148(2). A trial court's decision to award or deny attorney fees is reviewed for an abuse of discretion. *Beach v State Farm Mutual Automobile Ins Co,* 216 Mich App 612, 627; 550 NW2d 580 (1996).

Defendant filed a motion for attorney fees under MCL 500.3148(2) of the no fault automobile insurance act, MCL 500.3101 *et seq.*, and for case evaluation sanctions under MCR 2.403(O). The trial court denied attorney fees under MCL 500.3148(2), but awarded costs under MCR 2.403(O).

In general, a party may not recover attorney fees as an element of costs or damages unless a statute, court rule, or judicial exception expressly allows that remedy. *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 635; 552 NW2d 671 (1996). Michigan's no-fault automobile insurance act contains a provision allowing the award of attorney fees to an insurer for defending against a claim that was in some respect fraudulent or so excessive that it had no reasonable foundation. MCL 500.3148(2). MCL 500.3148(2) provides as follows:

> An insurer may be allowed by a court an award of a reasonable sum against a claimant as an attorney's fee for the insurer's attorney in defense against a claim that was in some respect fraudulent or so excessive as to have no reasonable foundation. To the extent that personal or property protection insurance benefits are then due or thereafter come due to the claimant because of loss resulting from the injury on which the claim is based, such a fee may be treated as an offset against such benefits; also, judgment may be entered against the claimant for any amount of a fee awarded against him and not offset in this way or otherwise paid.

And MCR 2.403, which governs case evaluations, provides in subsection (O)(1):

> If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.[4]

"Actual costs" are defined in MCR 2.403(O)(6) as (a) those taxable costs in any civil action and (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial court for services necessitated by the rejection of the case evaluation.

Defendant requested that the court "a) enter a judgment for sanctions pursuant to MCL 500.3148(2) in favor of the Defendant and against the Plaintiff in the amount of $38,497.45 **or in the alternative** b) enter judgment in favor of the Defendant in the amount of $23,626.39 as recoverable attorney fees[5] pursuant to case evaluation attorney fees together with costs and interest thereon, along with such other relief as this Honorable Court deems appropriate." (Emphasis added.) The trial court did not award defendant statutory fees under MCL 500.3148(2), but did award defendant reasonable attorney fees and costs as case evaluation sanctions under MCR 2.403(O).

In general, costs will be allowed to the prevailing party, unless prohibited by statute or by the court rules or unless the court directs otherwise. MCR 2.625(A)(1). Similarly, if a party rejects a mediation evaluation, it may be liable to pay the opposing party's "actual costs" under MCR 2.403(O)(1). "Actual costs" are costs taxable in any civil action and reasonable attorney fees for services necessitated by the rejection of the mediation evaluation. MCR 2.403(O)(6). The Supreme Court has held that, if the prevailing party has already been fully reimbursed for reasonable attorney fees, there are no "actual costs" remaining to be reimbursed under MCR 2.403. *McAuley v General Motors Corp*, 457 Mich 513, 523; 578 NW2d 282 (1998), overruled in part on other grounds *Rafferty v Markovitz*, 461 Mich 265, 272-273 n 6; 602 NW2d 367 (1999). Double recovery of attorney fees under two different authorities is not appropriate, even if the authorities advance different purposes. *Rafferty*, *supra*, and repudiating dicta in *McAuley*, *supra* at 513, "that left open the possibility of recovering attorney fees under both a court rule and a statute where each attorney-fee provision serves an independent purpose." Where a prevailing party has already been reimbursed for his reasonable attorney fees, there are no remaining "actual costs" to be reimbursed under MCR 2.403(O). *McAuley*, *supra* at 523. Because defendant was awarded reasonable attorney fees and costs under MCR 2.403(O), any possible error in the trial court's failure to award attorney fees under MCL 500.3148(2) is harmless.

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[4] Both parties rejected the case evaluation, which recommended an award in favor of Al-Janabi in the amount of $27,500 and in favor of Hinow in the amount of $10,000.

[5] Defendant sought attorney fees at an hourly rate of $200 for senior members of the firm and $175 for junior members.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Peter D. O'Connell